

1509508 (Migration) [2018] AATA 3773 (5 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1509508

MEMBER: Justine Clarke

DATE: 5 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 05 September 2018 at 4:59pm

CATCHWORDS

MIGRATION – Partner (Residence)(Class BS) – Subclass 801 (Spouse) – lack of evidence of a genuine relationship – no wedding celebrations to save on costs – joint finances prior to cessation – did not live together for the period stated – non-exclusive relationship – travelled overseas with another man – applicant not biological father of sponsor’s daughter – relationship ceased – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F,65, 359A, 359AA, 362A, 376
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cl 801.221

CASES

Singh v MIEA [1996] FCA 1429

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if this decision is published, names and other identifying material must be removed from or modified in the published version of the decision.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 July 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant [is] [an age] year old national of Vietnam.
3. On 3 May 2012, [the applicant] applied for the visa on the basis of his relationship with his [sponsor]. At the time of this decision, [the sponsor] is [an age] year old Australian citizen.
4. At the time of application, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Clause 801.221(1) requires that, at the time of decision, the applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).
5. The applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 of Schedule 2 to the Regulations. The delegate assessed the application according to the provisions of cl.801.221(2), finding it to be the only subclause relevant to the applicant's circumstances. The delegate assessed the evidence before the Department—including information given in an interview with the applicant and the sponsor on 27 February 2015—and concluded:
 6. You have provided minimal information to demonstrate the progression of your relationship since the grant of your temporary visa, despite being interviewed by departmental officers and being given the opportunity to provide additional information. The information you have provided indicates that you have a shared address in common and are known to each other. It does not however demonstrate the financial aspects of your relationship, the nature of the household, the social aspects of your relationship or your commitment to each other.
7. The delegate found that the applicant did not meet cl.801.221(2) as the delegate was not satisfied that the applicant and the sponsor were spouses as defined under s.5F of the Act.
8. On 15 July 2015, the applicant applied to the Tribunal for review of the primary decision. The applicant has been represented by a registered migration agent throughout the review, albeit that there was a change of representative.
9. On 25 July 2016, the Tribunal wrote to the applicant requesting that he provide current and up to date information including any changes that have occurred with the relationship, in writing, by 8 August 2016. Submissions and further evidence were provided by this time.
10. The applicant first appeared before the Tribunal (differently constituted) on 12 September 2016 to give evidence and present arguments. At that time, the Tribunal also received oral evidence from the sponsor and [Mr A] (the applicant's brother-in-law as he is married to the sponsor's sister). The representative attended the Tribunal hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
11. At the hearing, the then presiding Member allowed the applicant seven days to provide medical documents relating to the sponsor's health in order to corroborate his claim that the

sponsor's medical issues were a factor in the delayed progression of their relationship since the grant of the Subclass 820 visa. On 15 September 2016, within the permitted time frame, the applicant's representative forwarded a number of documents.

12. Due to subsequent events, the then presiding Member was not available to finalise the review.
13. The applicant claims that his relationship with the sponsor ceased on 20 July 2017.
14. [In] July 2017, the sponsor gave birth to her daughter.
15. On 28 July 2017, the applicant appointed a new representative.
16. On 31 July 2017, the new representative wrote to the Tribunal to advise that he acted for a person—whose name was not the applicant's name—and to advise that there had been a change in the relationship status as the relationship had broken down due to family violence committed by the sponsoring partner.
17. On 10 August 2017, an officer from the Tribunal contacted the new representative (hereafter the representative) to query for whom he acts. Later that same day, the representative wrote to the Tribunal to clarify that he acts for [the applicant] and to confirm that [the applicant] had advised that the relationship had broken down due to family violence committed by the sponsoring partner.
18. Clause 801.221(6)(b) and (c) of Schedule 2 to the Regulations relevantly require that the applicant would meet the requirements of subclause (2) except that the relationship between the applicant and the sponsoring partner has ceased and the applicant has suffered family violence committed by the sponsoring partner (here, [the sponsor]). The applicant claims this occurred.
19. The representative's letter of 10 August 2017 continued by stating that the applicant would be making a non-judicially determined claim of family violence committed by the sponsoring partner and requested that the applicant be granted an extension of 180 days in which to provide the relevant evidence, being three statutory declarations and submissions.
20. On 6 September 2017, the Tribunal wrote to the applicant, by way of his representative, in response to the correspondence about the change of relationship status. The Tribunal requested:
 - details of the two independent experts, referred to in the representative's letter, from whom the Tribunal can expect to receive statutory declarations; and
 - the applicant's reasons why he needed such a long time period in which to prepare and submit his own statutory declaration and the reasons why such a declaration had not been submitted already.
21. The Tribunal requested this information, in writing by 20 September 2017.
22. On 19 September 2017, within the permitted time period, the representative provided information in response. The information submitted suggested that the applicant intended to depart Australia to visit his grandmother in Vietnam as she was seriously ill. The Tribunal granted the extension of time that had been requested but notes now that the applicant's movement records evidence him as not having departed Australia at that time.

23. On 10 January 2018, the applicant appeared before the Tribunal to give evidence and present arguments. The hearing response that was submitted suggested that no witnesses would be attending or otherwise available to give evidence in support of the review and no other witnesses attended the hearing. The representative attended the Tribunal hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
24. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The applicant claims the relationship with the sponsor has ceased, and that he has been the victim of family violence as provided for in cl.801.221(6)(c)(i) of Schedule 2 to the Regulations.
26. Further to, or in the alternative, it was also submitted in the written submissions filed on 6 January 2018 that the applicant had initiated a Family Law action seeking custody or joint custody of, or access to, the child that he claimed is his daughter pursuant to cl.801.221(6)(c)(ii). However, the applicant later submitted the report of DNA testing, dated [April] 2018, that had been ordered by the Federal Circuit Court of Australia, which concluded that the applicant was excluded from identification as the biological father of the sponsor's named daughter. He also submitted a copy of the sponsor's affidavit of [December] 2017 that had been filed with the Court where she names the biological father of her child—a man other than the applicant.
27. Accordingly, the issue is whether the applicant meets cl.801.221(6)(b) and (c) of Schedule 2 to the Regulations.

28. Was the applicant the spouse of the sponsoring partner?

29. Clause 801.221(6)(b) requires that, at the time of this decision, the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased. Essentially, the prior existence of a relationship is a precondition to an assessment of family violence (cl.801.221(6)(c)(i)) or legal obligations in respect of a child (cl.801.221(6)(c)(ii)).
30. The Tribunal accepts that the parties were married in [Australia] [in] March 2012. A certified copy of the registered marriage certificate is on one of the Department's files. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

31. Regulation 1.15A(3) factors

32. Regulation 1.15A(3)—extracted in the attachment to this decision—provides relevant factors for determining whether a spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
33. In assessing these issues, the Tribunal has had regard to all documents on the Department's and the Tribunal's files as well as the oral evidence given at the hearing conducted by the former presiding member and the hearing conducted by the current presiding member. The current presiding member has listened to the entire audio recording of the hearing conducted by the previous presiding member.

34. Information put to the applicant for comment or response pursuant to s.359AA at the first hearing

35. Having heard the applicant's oral evidence, the former Member informed the applicant that some of his evidence was inconsistent with what he had told the Department in his interview on 27 February 2015. She identified two matters.
36. First, the Tribunal explained that the applicant had given oral evidence to the Tribunal that he and the sponsor had first lived together in the main house at the [Address 1] property for a few months (the Tribunal notes that he could not recall exactly how long) before they both moved into the bungalow at the property yet he had told the Department, in his interview, that since he and the sponsor had lived together, he had always lived in the bungalow and that, even though the house was rented out, he did not know who resided there because he did not go into the house.
37. Secondly, the Tribunal explained that the applicant had told the Tribunal that he paid the bills at the [Address 1] property and that the bills were in his name but that he had earlier told the Department that he did not know whose names the bills were in because they were not in his name and that he simply paid cash to the owner and that he did not receive any receipts for payments for rental bills.
38. The Tribunal put the adverse information to the applicant for comment or response pursuant to s.359AA, and followed the process in s.359AA(1)(b)(i)–(iii). The former Member explained that the information that the applicant had provided is different and inconsistent and that it may lead the Tribunal to find that he is not credible. She explained that this information is relevant in determining whether or not the relationship between the applicant and the sponsor is genuine, and that if the Tribunal accepts the information, then the Tribunal may consider the information to be the reason, or part of the reason, for the Tribunal affirming the decision that is under review.
39. The applicant gave his comments/response at the first hearing.
40. With respect to the first matter, the applicant stated that he did not believe that the delegate had asked him whether he had lived inside the house but rather had asked him how many rooms were in the house. He said that he had misunderstood the Department's question. He stated that, after he and the sponsor moved from the house to the bungalow, they did not enter the house and that the owner of the house had extended the house to make more rooms so he (the applicant) did not know how many rooms there were in the house. He also said that he could not remember how many rooms were in the house because he had lived there three years before the Departmental interview.
41. The Tribunal accepts the applicant's response. This is because the Tribunal has reviewed the Department's notes from the interview conducted on 27 February 2015 and it is not clear that the applicant was asked whether he had lived inside the house at the [Address 1] property. Accordingly, the Tribunal does not consider this first matter to be the reason, or a part of the reason, for affirming the decision in this review.
42. With respect to the second matter, the applicant stated that the bills had been in his name for a few months only before he and the sponsor moved from the main house into the bungalow. At that point, the bills were in the owner's name and they paid the rent. He said that he had misunderstood the Department's question and that, when he returned home from the interview, he realised that he had misunderstood the Departmental officer/s.
43. The Tribunal considers that the applicant has been imprecise in stating that he and the sponsor had lived in the main house for a few months only. The documentary evidence

submitted suggests that the applicant and the sponsor lived in the main house for a much longer period.

44. The Tribunal notes that the applicant has submitted a number of gas and electricity bills that are in his name and which were addressed to him at the [Address 1] property. While these bills do not contain issue dates, they do contain due dates. Some of the bills have due dates in 2012 (June–October) and some in 2013 (June, August and September). The Tribunal also notes [Mr B]’s evidence in his statutory declaration of 4 May 2015 was that he finished building the bungalow in December 2013 and that the applicant and the sponsor asked him if they could move from the main house to the bungalow. He did not specify which month they moved in but said that they paid \$1,000 per month to rent the bungalow, which included the cost of electricity. Accordingly, the evidence submitted suggests that the applicant lived in the main house at the [Address 1] property for closer to a year and a half—namely from mid-2012 until sometime after the bungalow was finished in December 2013.
45. The written submissions of 4 March 2015 state that [Mr B]’s statutory declaration was submitted, in part, because it ‘explains a problem occurring at the interview regarding electricity payments and responsibility’. This corroborates the applicant’s claim that after his departmental interview, he realised he had misunderstood one of the questions and sought to correct the record. Notwithstanding, the Tribunal is concerned that, at the time of the first hearing on 12 September 2016, the applicant gave oral evidence that he and the sponsor had lived in the main house at the [Address 1] property for a few months only when the documentary evidence he submitted suggests that he lived in the main house for closer to a year and a half. The Tribunal is concerned that the applicant may not have lived in the main house at the [Address 1] property for the full period of time suggested by the documentary evidence. In the context of an allegation—detailed further below—that the applicant was not living at the [Address 1] property with the sponsor, the Tribunal considers this second matter to be a part of the reason for affirming the decision in this review.
46. The Tribunal also put another matter to the applicant pursuant to s.359AA, and similarly followed the process in s.359AA(1)(b)(i)–(iii). The former Member explained that the applicant had told the Tribunal that the sponsor had left Australia and travelled to Vietnam on one occasion only since 2011—that is, since the parties claim to have been together. However, the former Member explained that this oral evidence conflicts with the Department’s records regarding the sponsor’s movement in and out of Australia. The former Member stated that those records indicate that the sponsor had departed Australia six times between 2011 and 2014. The former Member explained that the information was relevant to the review because the applicant’s knowledge of the sponsor’s travel is a matter that the Tribunal would have regard to in considering the claimed genuine and continuing nature of the relationship. The Tribunal explained to the applicant that, if the Tribunal accepts the information, the Tribunal may consider that the information would be the reason, or part of the reason, for the Tribunal affirming the decision that is under review.
47. The former Member gave the applicant details of all the sponsor’s movement records for the relevant period of time.
48. Then the applicant gave his comments/response. He said that, for the first two trips, he had still been living in [City 1]. He was also able to give details about some of her other trips.
49. The Tribunal considers that the applicant’s first statement to the Tribunal that the sponsor had travelled to Vietnam on one occasion only since 2011 was incorrect and may have been given without sufficient care. The fact that, once he was invited to comment on or respond to the information, the applicant was able to provide details about the trips, including noting that he was living in [City 1] for the first two trips and the reasons for her other trips satisfies the Tribunal that the applicant was sufficiently knowledgeable of the sponsor’s travel.

50. As with the first matter put to the applicant for comment or response pursuant to s.359AA of the Act, the Tribunal does not consider this seemingly adverse information to be the reason, or a part of the reason, for affirming the decision in this review.

51. The non-disclosure certificate

52. On 2 September 2015, a delegate of the Minister purported to make a non-disclosure certificate pursuant to s.376 of the Act. This certificate is on the Department's file for consideration of the grant of the Subclass 801 visa.
53. The applicant would be aware of the existence of this certificate because the Tribunal mentioned it in its letters, dated 7 September 2016 and 16 August 2017, which responded to his requests (from each respective representative) for access to written material pursuant to s.362A.
54. The Department sought to protect the disclosure of documents containing passenger arrival cards with third party information, an allegation and what appears to be an internal working document on the basis that 'disclosure of this material would be contrary to the public interest'.

55. The Tribunal's view on the validity of the certificate

56. Upon review, the Tribunal considers that the certificate is invalid as the public interest reasons are inferred rather than specified. The Tribunal considers that the particular explanations—namely, 'contains PAX cards with 3rd party information' and 'contains allegation'—are mere descriptions. In the Tribunal's view, these descriptions could not form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matters contained in the documents should not be disclosed.
57. As the Tribunal considers that the certificate is invalid, the certificate was not discussed at the hearing conducted by the current presiding Member and the Tribunal has not given the applicant a copy of the certificate.

58. Relevance of the information to this review

59. The Tribunal considers that the information the subject of the invalid certificate is relevant to the matters being considered in this review. Further, the information engages the Tribunal's obligations under s.359A of the Act.
60. The Tribunal notes that the Department communicated the gist of the allegation to the applicant in the interview on 27 February 2015. At the first hearing, the former Member who was presiding also discussed the allegation with the applicant and invited him to comment on the allegation, including 'about where it may have come from; why someone might have made it or why I shouldn't put some weight on it, given you say it is not true'. However, the Tribunal considers that the former Member did not put the particulars of the allegation to the applicant for comment pursuant to s.359AA of the Act.
61. After the second hearing, the current presiding Member arranged for the Tribunal to write to the applicant pursuant to s.359A.
62. As will be explained, the Tribunal considers that it has complied with its obligations under s.359A of the Act. As will also be explained, the Tribunal places some weight on this adverse information and this is part of the reason why the Tribunal finds that the applicant does not meet cl.801.221(6)(b) of Schedule 2 to the Regulations and, accordingly, forms part of the Tribunal's decision to affirm the decision under review.

63. The first s.359A letter

64. On 14 March 2018, the Tribunal wrote to the applicant, by way of his representative, pursuant to s.359A of the Act to give him clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review. The Tribunal stated that it was inviting the applicant to comment on or respond to information about which he had not previously been invited to comment on or respond to.
65. The letter continued by noting that, as he had been informed at the first hearing, the Department's file contains an allegation made against the applicant. A particular of information that was alleged by that named source and not previously communicated to the applicant is that his sponsor is in a relationship with a man named '[Mr B]'.
66. The Tribunal also informed the applicant that the Department's file contains several incoming passenger cards completed by the sponsor. The particulars of the information are that:
- the sponsor listed '[Mr B]' as her emergency contact person when completing her incoming passenger card on 8 February 2014.
67. The Tribunal explained that the information suggests that, during the course of the claimed relationship, the sponsor listed another man—a man with the same name as that of the person that she was alleged to be in a relationship with—as her emergency contact person. This information could point away from the applicant's claim that, when he was in a relationship with the sponsor, the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing.
68. Next the letter stated that the Department's file also contains internal communication between officers of the Department noting that the sponsor and [Mr B] had travelled together on a number of occasions. On the basis of this information, the Tribunal reviewed the sponsor's movement records (in and out of Australia) and those of [Mr B]. These movement records are on the Tribunal's file.
69. The particulars of the information are that:
- the sponsor and [Mr B] both departed Australia on 2 February 2018 and both re-entered Australia on 27 February 2018 (different flights);
 - the sponsor and [Mr B] both departed Australia on 23 September 2013 and both re-entered Australia on 8 October 2013 (same flights);
 - the sponsor and [Mr B] both departed Australia on 22 January 2011 (same flight); and
 - the sponsor and [Mr B] both departed Australia on 31 May 2008 and both re-entered Australia on 1 July 2008 (same flights).
70. The Tribunal then noted that the applicant and the sponsor married [in] March 2012. The Tribunal noted that the applicant's movement records evidence him as having been onshore in Australia from 25 August 2010, other than for a few days in April 2013.
71. The letter continued by stating that the information suggests that, after the parties' marriage, the sponsor travelled overseas with another man on 23 September 2013 and returned on 8 October 2013 with that same man. The information suggests that she had previously travelled overseas with this man (in 2008 and early 2011) and that, since the cessation of the relationship, she has travelled overseas again with this man (in February 2018). The

information that the sponsor travelled overseas with another man—a man with the same name as that of the person that the sponsor was alleged to be in a relationship with—on a number of occasions could point away from the applicant's claim that, when the parties were in a relationship, they had a mutual commitment to a shared life as husband and wife to the exclusion of all others.

72. The Tribunal informed the applicant that this information is relevant to the review because to meet the definition of 'spouse' under s.5F of the Act, prior to the cessation of the relationship, the parties must have been in a 'married relationship'. Two of the four requirements for a 'married relationship', for the purposes of the Act, are that:

- the parties have a mutual commitment to a shared life together as husband and wife to the exclusion of all others (s.5F(2)(b)); and
- the relationship is genuine and continuing (s.5F(2)(c)).

73. The Tribunal informed the applicant that if the Tribunal relies on this information in making its decision, it may conclude that, prior to the cessation of the relationship, he did not meet some of the mandatory criteria for a spousal relationship within the meaning of s.5F of the Act.

74. The letter continued by stating that the consequence of this information being relied upon would mean that the Tribunal may find that, prior to the cessation of the relationship, he was not the 'spouse' of the sponsor within the meaning of s.5F of the Act, which in turn may lead it to find that he does not meet cl.801.221(6)(b) of Schedule 2 to the Regulations. This would lead the Tribunal to affirm the decision not to grant him a Partner (Residence) (Class BS) visa.

75. The Tribunal invited the applicant to comment on or respond to the information, or request an extension of time to do so, by 28 March 2018 and outlined the consequences of failing to do so.

76. The response to the first s.359A letter

77. On 19 March 2018, within the timeframe for replying, the applicant submitted written submissions and a number of documents in response.

78. The submissions did not directly address the particular that the sponsor had listed '[Mr B]' as her emergency contact person when completing her incoming passenger card on 8 February 2014. However, the Tribunal considers that the following comments or response can be viewed as also being applicable to this particular.

79. The submissions outline the marriages between four brothers and the sponsor and two of her sisters and one of her nieces. This can be summarised as follows:

- One brother (not named in the submissions) is married to the sponsor's older [sister].
- Another brother, [Mr A] (who was a witness at the first hearing), is married to another of the sponsor's older [sisters].
- A different brother, [Mr K], is the sponsor's former husband.
- The other brother, [Mr B], is married to the sponsor's [niece].

80. (The Tribunal notes that, in her statutory declaration of 21 April 2018, [Ms J] declares that she knows that [Mr B] married one of the sponsor's nieces).
81. It was submitted that [Mr B] —with whom the sponsor has travelled—is a member of the sponsor's family. The submissions noted that [Mr B] had been a witness at the applicant's and the sponsor's marriage (as recorded on the registered certificate of marriage); had made a Form 888 statutory declaration on 31 March 2012 (where he outlined his relationship with them both and their social interaction); and that he had attended a number of social functions with the applicant and the sponsor (as identified in a number of photographs).
82. With respect to the joint travel in 2008, it was submitted that the applicant verily believed that [Mr B] and the sponsor had travelled together to Vietnam to visit relatives. It was noted that, at that time, the sponsor was still married to [Mr K] ([Mr B]'s brother). It was claimed that they had travelled together because of that relationship and so the sponsor could assist [Mr B] as an interpreter as he does not speak fluent Vietnamese.
83. With respect to the joint travel in 2013, it was submitted that the sponsor and [Mr B] travelled together to visit the sponsor's father who was very ill and subsequently passed away in 2014. It was submitted that:
84. Our client did not accompany his former spouse because at the material time, he has just started in a new job, he was under probation, and did not want to jeopardise his job.
85. With respect to the travel in 2018, it was submitted that it could also be for a family-related reason or for some other reason unknown to the applicant.
86. It was submitted that the sponsor's and [Mr B]'s history of travelling together or at the same times in 2008, 2011, 2013 and 2018 was 'nothing more than simply travelling together as family members'.
87. In the alternative, the various links in the family were noted and it was submitted that it was 'unintelligible' to think that [Mr B] would have been having an affair with his wife's aunt (amongst other possible constructions of the family relationships).
88. The submissions finished by reiterating the claim that, from the time of the marriage until the separation, the applicant was the spouse of his sponsor within the meaning of s.5F of the Act.
- 89. The Tribunal's conclusion on the sponsor having listed '[Mr B]' as her emergency contact person in her incoming passenger card**
90. The Tribunal has had regard to the reason which is implied in the submissions, that is, that the sponsor listed '[Mr B]' as her emergency contact person when completing her incoming passenger card on 8 February 2014 because [Mr B] was a family member. The Tribunal does not consider such an explanation to be plausible.
91. Rather, the Tribunal finds it puzzling that the sponsor would list [Mr B] as her emergency contact rather than her husband, the applicant—particularly given that, on the information before the Tribunal, it appears that this was not a trip where she was travelling with [Mr B]. In the context of an allegation that the sponsor was in a relationship with '[Mr B]' who owns a property in [Address 1] (detailed further below), this evidence causes the Tribunal to question the sponsor's commitment to the relationship. The Tribunal gives some weight to this evidence and it is part of the reason for affirming the decision under review.

92. The Tribunal's conclusion on the sponsor's record of having travelled overseas with [Mr B]

93. The Tribunal has considered the applicant's claim that the sponsor's record of travelling overseas with [Mr B] was 'nothing more than simply travelling together as family members'. However, the Tribunal does not accept this explanation. The Tribunal considers that this record of joint travel, and the fact that [Mr B] has the same first name [and] owns property in the same street as that of the person the sponsor was alleged to be in a relationship with, does point away from the applicant's claim that, when the parties were in a relationship, they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. This adverse information is another part of the Tribunal's reason for affirming the decision under review.

94. The second s.359A letter

95. On 9 April 2018, the Tribunal wrote again to the applicant, by way of his migration agent. The Tribunal acknowledged its previous letter of 14 March 2018 and the response received. The Tribunal informed the applicant that it was now writing to him in order to fulfil its obligations under s.359A in respect of other adverse information.
96. The first part of the Tribunal's letter was in respect of the allegation. This part of the letter is extracted below.

1. The allegation

First, the Tribunal acknowledges that, from its review of the Department's file, it is aware that, at your interview with the Department on 27 February 2015, you were informed of an allegation that had been received by the Department [in] January 2014 and you were invited to comment on or respond to that information. The Tribunal notes that you commented on or responded to that information during your interview and subsequently in written submissions dated 4 March 2015 and that [Mr B]'s statutory declaration of 4 March 2015 was also submitted at that time.

The Tribunal's letter of 14 March 2018 outlined one particular of information from the allegation that the Tribunal considered had not been communicated to you previously at the first Tribunal hearing. You may recall that the Member who was presiding at the first hearing on 12 September 2016 discussed the allegation with you. However, the Tribunal considers that that Member did not put the particulars of the allegation to you, pursuant to s.359AA, nor did that Member follow the process in s.359AA(1)(b)(i)–(iii).

Accordingly, the Tribunal considers it necessary to put all of the relevant particulars of that allegation to you now pursuant to the process in s.359A of the Act.

The Department's file contains an allegation made against you by a named source (first name only) that was received by the Department [in] January 2014.

Please note, however, that we have not made up our mind about the information.

The particulars of the information are that, at that time:

- your marriage was contrived or 'fake' so that you may achieve a positive migration outcome and so that your sponsor could receive money;
- your sponsor was in a relationship with '[Mr B]' who owns the property in [Address 1]; and

- you and your sponsor did not live together as she was living at the [Address 1] property with [Mr B] and that you were living somewhere else.
- The information outlined above is relevant to the review because to meet the definition of 'spouse' under s.5F of the Act, prior to the cessation of your relationship, you and your sponsor must have been in a 'married relationship'. Three of the four requirements for a 'married relationship', for the purposes of the Act, are that:
 - the parties have a mutual commitment to a shared life together as husband and wife to the exclusion of all others (s.5F(2)(b));
 - the relationship is genuine and continuing (s.5F(2)(c)); and
 - the parties live together or do not live separately and apart on a permanent basis (s.5F(2)(d)).

If the Tribunal relies on this information in making its decision, it may conclude that, prior to the cessation of the relationship, you did not meet some of the mandatory criteria for a spousal relationship within the meaning of s.5F of the Act.

97. The consequence of this information being relied upon is that the Tribunal may find that, prior to the cessation of the relationship, you were not the 'spouse' of your sponsor within the meaning of s.5F of the Act, which in turn may lead it to find you do not meet cl.801.221(6)(b) of Schedule 2 to the Regulations. This would lead the Tribunal to affirm the decision not to grant you a Partner (Residence) (Class BS) visa.

98. The second part of the Tribunal's letter was in respect of Facebook profiles. This part of the letter is extracted below.

2. Facebook profiles

Secondly, the Tribunal has reviewed the information on the Department's file again. The Tribunal writes to inform you of particulars of information that, while previously on the Department's file, have not been previously communicated to you.

The Department's file contains some screenshots of your publicly accessible Facebook profile that were taken on or about 2 October 2014.

Please note, however, that we have not made up our mind about the information.

The particulars of the information are:

- The screenshots from your Facebook profile do not refer to you as being married to the sponsor and do not appear to refer to her at all.
- The screenshots from your Facebook profile include two photographs of you seated close to a woman who is not your sponsor in late December 2012 with the caption 'Christmas is coming [smile face symbol]'. One of the responses from one of your Facebook friends to these photos was to post 'the [loveheart symbol]' and from another friend, to post the question 'Your Girl friend?'
- This information is relevant to the review because it suggests that, prior to the cessation of the relationship, you may not have been in a committed and genuine relationship with the sponsor. As was outlined above, two of the requirements for a 'married relationship' for the purpose of the Act, are that:
 - the parties have a mutual commitment to a shared life together as husband and wife to the exclusion of all others (s.5F(2)(b)); and
 - the relationship is genuine and continuing (s.5F(2)(c)).

If the Tribunal relies on this information in making its decision, it may conclude that, prior to the cessation of the relationship, you did not meet some of the mandatory criteria for a spousal relationship within the meaning of s.5F of the Act.

99. The consequence of this information being relied upon is that the Tribunal may find that, prior to the cessation of the relationship, you were not the 'spouse' of your sponsor within the meaning of s.5F of the Act, which in turn may lead it to find you do not meet cl.801.221(6)(b) of Schedule 2 to the Regulations. This would lead the Tribunal to affirm the decision not to grant you a Partner (Residence) (Class BS) visa.

100. The Tribunal's letter then outlined the process for commenting on or responding to the adverse information.

101. The response to the second s.359A letter

102. On 19 April 2018, within the requested timeframe, the applicant's representative submitted written submissions and a number of documents in response. (The Tribunal notes that further documents were then provided on 22 and 26 April 2018).

103. Amongst the documents submitted were statutory declarations made by [Mr H] and [Ms I] on 12 April 2018 and 14 April 2018 respectively.

104. The submissions requested that, if the Tribunal were to rely on the allegation, it disclose the identity of the informant and/or provide the applicant with information about the provenance of the information that might possibly have had a bearing on its cogency or truthfulness so that the applicant could provide a meaningful response.

105. The allegation that the parties were in a fake marriage

106. The submissions state that the applicant denies that he entered into a fake or contrived marriage with the sponsor to achieve a positive migration outcome. They also state that he denies having paid the sponsor before or during their marriage or after their separation to marry him or that she received money from him before their marriage or during their marriage or after their marriage in return for sponsoring him. It was submitted that the bank statements clearly demonstrate that there were no abnormal transactions to demonstrate that the applicant was paying the sponsor for a fake marriage or agreeing to marry him. It was submitted that the sponsor married the applicant because they were in love and they wanted to be husband and wife.

107. The Tribunal notes that both [Mr H] and [Ms I] declared that, from their knowledge through socialising with the parties, the applicant and the sponsor 'were a real married couple and genuine relationship' (the Tribunal notes that the same words were used in each declaration in this respect).

108. The allegation that the sponsor was in a relationship with '[Mr B]' who owns the property in [Address 1]

109. The submissions of 19 April 2018 did not go into much detail about this allegation. The Tribunal assumes that this is because this allegation had been the focus of the submissions of 19 March 2018.

110. Notwithstanding, the submissions of 19 April 2018 submitted that the evidence that was submitted 'clearly show our client and his sponsor/wife had a mutual commitment to a shared life together as husband and wife to the exclusion of [Mr B] and all others (s.5F(2)(b))'.

111. The Tribunal also notes that [Mr H] declared, in his statutory declaration, that he knew that [Mr B] was the landlord of the property. (The Tribunal also notes that, at the first hearing, the applicant indicated to the Tribunal that the [Address 1] property was owned by [Mr B], the witness [Mr A]'s brother). In her statutory declaration, [Ms I] declared that, at a party, the sponsor had introduced her niece to [Ms I] as being the partner of [Mr B].

112. The allegation that the parties did not live together

113. The submissions state that the applicant emphatically asserted that he and the sponsor lived together at the [Address 1] property while they were married. He categorically denies that while the sponsor was living at the [Address 1] property, that he was living elsewhere. The Tribunal notes the imprecision of this submission as the applicant's and the sponsor's own evidence is that the sponsor moved into the [Address 1] property before the applicant did as he was still living in [City 1] for the early part of their claimed relationship.

114. The submissions referred to the plethora of 'probative evidence' such as bank statements, utility statements, pay slips and other documents that demonstrate that the applicant and the sponsor had lived together at the [Address 1] property 'and no where else' while they were married. Again, the Tribunal notes the imprecision of this submission as the applicant, the sponsor and [Mr A] all gave oral evidence at the first hearing that they were living together at a property in [Address 2].

115. The Tribunal notes that the applicant also submitted a copy of the sponsor's affidavit of 1 December 2017 where she states that she and the applicant had lived together at the [Address 1] property. The Tribunal also notes that, in their respective statutory declarations, both [Mr H] and [Ms I] declared that, from their knowledge through socialising with the parties, the applicant and the sponsor lived together at the [Address 1] property.

116. The submissions state that the applicant admits that he and the sponsor paid rent to [Mr B], whom he reasonably believes was the lawful proprietor of the [Address 1] property, including when they moved to the bungalow on the property. The applicant referred to [Mr B]'s statutory declaration of 4 March 2015 which was made and submitted to the Department after the Department had raised the allegation with the applicant at the interview on 27 February 2015.

117. Facebook profiles

118. With respect to the s.359A information that the screenshots of the applicant's Facebook profile taken in early October 2014 do not refer to the applicant as being married to the sponsor, the submissions stated the following.

119. Our client has instructed us that he remembers, to the best of his memory, [he] created his Facebook account sometime in 2009 when he was a single man. Hence, his marital status was 'single'. Since then our client did not bother to change his marital status (to 'in a relationship' or 'married') even when he was courting his sponsor/wife and after they were married.

120. With respect to the s.359A information that the relevant screenshots from the applicant's Facebook profile do not appear to refer to the sponsor at all, the submissions noted that the applicant's Facebook account does in fact contain three photographs of the parties together. The applicant provided the Tribunal with copies of these screenshots. One is of a post made on 9 April 2012, another is of a post made on 11 April 2012, and the final one is of a post made on 29 January 2013.

121. The final matter addressed was the information that the applicant's Facebook profile included two photographs of him seated close to a woman who is not the sponsor in late December 2012 with the caption 'Christmas is coming [smile face symbol]' and that one of the responses from one of applicant's Facebook friends to these photos was to post 'the [loveheart symbol]' and from another friend, to post the question 'Your Girl friend?'

122. The submissions outline the applicant's claims that he recollects that these photographs were taken at the Christmas party for his then workplace on 24 December 2012. He identifies the woman as a colleague named [name deleted] and he claims that this was the first time that he had met [his colleague] as he recollects that they worked different shifts. It was submitted that:

123. the said photograph does not reveal any evidence in a material or emotional or physical sense that our client was in a relationship with [his colleague]. We submit that this photograph, as were the other photographs taken on that day, was only innocent 'selfie' or 'welfie' which was then posted on our client's Facebook account along with other photographs and 'welfies' taken during our client's office Christmas party (see Appendix 'D').

124. In his statutory declaration, [Mr H] declared that he used to work with the applicant at a named workplace and that the woman in the photographs at the Christmas party was [his colleague], and that she and the applicant 'are normally co-worker at our company'.

125. The earlier-mentioned comments that were left on the applicant's Facebook profile next to the photograph/s were described, in the submissions, as 'innocent teasing or banter'.

126. The Tribunal's conclusion on the matters raised by the 'dob-in'

127. The Tribunal acknowledges that the applicant has consistently denied the truth of the allegations contained in the 'dob-in'—at his interview with the Department on 27 February 2015, at the first hearing on 12 September 2016 and by way of the submissions filed in response to the two s.359A letters. In his statutory declaration of 4 March 2015, [Mr B] also denied ever having been in a relationship with the sponsor. The Tribunal also notes that, at the first hearing, when the former Member asked the sponsor whether she wanted to comment on the allegation, the sponsor replied that she simply wanted to prove that her relationship with the applicant is genuine.

128. The Tribunal has considered the refutations. The Tribunal has also considered the applicant's explanation, given at the first hearing, as to who may have made the 'dob-in' and why. The following is a record of that evidence.

129. The Tribunal: Do you want to make any comment about that allegation to me—about where it may have come from; why someone might have made it or why I shouldn't put some weight on it—given you say it is not true?

130. The applicant: Firstly, I'd like to say that the allegation is not true. There can always be some people who don't like me—in my jobs or in life—so they would make up stories about us and things like that but our relationship is genuine. For example in my job, if I have made a better [ed: unclear—possibly 'decision'] there would be people who would feel envious and who would say bad things about me to the boss and things like that. But, I believe that I always do the right things.

131. The Tribunal: But why would a person in your work environment, in the circumstances you describe, go out of their way to contact the Department to indicate

information with some level of specificity about you and your wife which would result in them alleging that your relationship is not genuine?

132. The applicant: Everyone wants to go to work and do their job well. And some people may want to do their job really well and love their job and it makes some other people feel very envious and some people don't want to work and things like that and that is why they do things which harm you. That is the reason that I want to work hard every day so I can support my wife so she can stay home and does not have to work one day. I'd like to tell you that I work in order to support my family and I don't really care what other people say because I don't know who they are.

133. The Tribunal notes that the person who made the 'dob-in' gave their first name only. Accordingly, in the second s.359A letter this person was described as 'a named source (first name only)'. However, it could also be described as an anonymous source as the person gave their first name only. While the Tribunal acknowledges that it would generally place limited weight on anonymous allegations, in the particular circumstances of this case and the Tribunal's concerns about the nature of the parties' claimed relationship prior to its cessation, the Tribunal does give some weight to the 'dob-in'. This is for three reasons.
134. First, the Tribunal notes and gives weight to the fact that the person made very detailed allegations. In these circumstances, the Tribunal considers it unlikely that the 'dob-in' was made by one of the applicant's work colleagues who was jealous of the applicant, as he suggested. Rather, the details in the 'dob-in' suggest that the person knew the parties well.
135. Secondly, the Tribunal notes and gives weight to the fact that other evidence before the Tribunal suggests that at least two of the allegations may be true. For example, with respect to the allegation that the parties did not live together, as discussed earlier, the Tribunal notes that the applicant gave oral evidence that he and the sponsor had lived in the main house at the [Address 1] property for a few months only yet he provided documentary evidence which suggested that they lived in the main house for closer to a year and a half.
136. With respect to the allegation that the sponsor was in a relationship with '[Mr B]' who owns the property in [Address 1], as discussed earlier, the Tribunal notes that the sponsor listed '[Mr B]' as her emergency contact person in her incoming passenger card on 8 February 2014 and the sponsor has a record of having travelled overseas with [Mr B], including during the period of the claimed relationship with the sponsor.
137. Finally and importantly, the Tribunal has concerns about the credibility of the applicant and the sponsor. The applicant and the sponsor did not inform the Department prior to the primary decision or the Tribunal at the first hearing of any times that they had lived separately, notably the time when the sponsor is said to have been imprisoned for a few months in 2015. It was only after the applicant made his family violence claim that he volunteered information about the sponsor's claimed imprisonment. The Tribunal considers that the parties' failure to inform the Department and the Tribunal of time that they spent living apart reflects poorly on their credibility and the Tribunal gives weight to this assessment that the parties have poor credibility. The Tribunal notes that because the test for a genuine and continuing relationship involves consideration of the subjective intentions of the parties to the relationship, issues of credibility of the parties to the relationship may assume particular importance: see *Singh v MIEA* [1996] FCA 1429 at [13] and [24] per Branson J.
138. The Tribunal queries the applicant's and the sponsor's motives in not providing fulsome evidence to the Department and the Tribunal about the sponsor's period of imprisonment at an earlier point in time. Accordingly, the Tribunal has doubts whether they have truthfully told

the Tribunal the full situation when they gave their oral evidence at the first hearing and in other documents before the Tribunal.

139. In such circumstances, the Tribunal is not prepared to dismiss the possibility that some or all of the allegations—that the parties were in a fake marriage; that the sponsor was in a relationship with “[Mr B]” who owns the property in [Address 1] and that the parties did not live together—were true when the ‘dob-in’ was made [in] January 2014. The Tribunal gives some weight to the matters outlined in the ‘dob-in’ and this adverse information is part of the Tribunal’s reason for affirming the decision under review.

140. The Tribunal’s conclusion on the Facebook profiles

141. The Tribunal notes the applicant’s submission that he did not update his relationship status on Facebook. The Tribunal also notes that the applicant has provided evidence of three photographs that were posted on Facebook in April 2012 and January 2013 showing him with the sponsor. The photographs posted on 9 and 11 April 2012 (the month after they married) show the parties in social settings with others whereas the photograph posted on 29 January 2013 shows the parties on their own and the sponsor is behind the applicant and embracing him at the waist.
142. The Tribunal has also considered the applicant’s comments or response to the second particular that was articulated in respect of the Facebook profile, concerning the photographs of him seated close to a woman who is not the sponsor that were posted in late December 2012. The Tribunal notes the claims that this was an ‘innocent “selfie” or “welfie”’ taken of colleagues at a Christmas party and that the comments posted next to the photograph/s were merely ‘innocent teasing or banter’.
143. The Tribunal accepts that the photographs are ‘innocent “selfies” or “welfies”’ but does not accept the explanation offered for the comments that were posted next to the photograph/s. Rather, the Tribunal finds that the applicant had not represented himself as being married to the sponsor to these Facebook friends or to his Facebook friends more broadly.
144. The Tribunal acknowledges that the applicant is not required to update his relationship status on Facebook. However, Facebook is a common way people socialise, and present their relationships to others, using the internet. While the Tribunal accepts that, at the relevant time, the applicant had posted three photographs of him with the sponsor and may not have been in a relationship with the woman (‘[colleague’s name]’) in the Christmas party photograph/s, the Tribunal finds that the applicant’s failure to represent his relationship with the sponsor to others via Facebook points away from his claim that, prior to the cessation of the claimed relationship, he and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others. This is because in 2012, the year the applicant married the sponsor, he can point to two photographs only of him with the sponsor, both in group settings, on Facebook, yet there were two other photographs of him seated so close to another woman in December of that year that it caused two of his Facebook friends to comment ‘the [loveheart symbol]’ and ‘Your Girl friend?’ respectively. The Tribunal is puzzled by the applicant’s actions on Facebook in the first year of his marriage and it causes the Tribunal to question his commitment to his claimed relationship with the sponsor. This adverse information is part of the Tribunal’s reason for affirming the decision under review.

145. Consideration of the r.1.15A(3) factors

146. *The financial aspects of the relationship*

147. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal

obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.

148. At the first Tribunal hearing, both the applicant and the sponsor gave consistent oral evidence about the financial aspects of their relationship as at that time, including about their own and the other's employment. The Tribunal notes that the applicant also provided much documentary evidence pertaining to his employment throughout the years.
149. At that hearing, the Tribunal focused on asking the parties questions about the extent of any pooling of financial resources and the basis of any sharing of day-to-day household expenses.
150. At the second hearing, the applicant told the Tribunal that, prior to the cessation of his claimed relationship with the sponsor, they did not jointly own real estate or other major assets or have any joint liabilities such as joint loans or credit cards.
151. Prior to the cessation of the parties' claimed relationship on 20 July 2017, the applicant's and the sponsor's main joint assets appear to be their three joint bank accounts with [Bank 1]. One is a so-called '[Account 1]' account, another is a '[Account 2]' account and the last one is a '[Account 3]' account. The former two accounts appear to have been used primarily for day-to-day transactions and the latter for savings. The Tribunal finds that, prior to the cessation of the claimed relationship, the parties did not have any major assets together, outside their three joint bank accounts.
152. Notwithstanding having three joint bank accounts, the Tribunal notes that at the hearings the applicant and the sponsor used the terminology of 'a joint bank account' (singular). For example, at both hearings, the applicant gave oral evidence that his income was deposited into the joint bank account but that the sponsor had her own personal bank account. He told the Tribunal that the sponsor used her own salary for her own personal spending or to support her family in Vietnam. The sponsor gave consistent oral evidence and said that almost all of her income was spent on medication that she needed. (The Tribunal also notes that there is some evidence before the Tribunal that the applicant had his own personal bank account with [another] Bank).
153. While it might appear unusual for one party to a relationship to share their funds and for the other to retain their own funds for personal expenditure, the Tribunal does not consider this to be the reason, or a part of the reason, for affirming the decision in this review. In this respect, the Tribunal notes that, at the second hearing, the applicant told the Tribunal that he had viewed it as his role to financially support the sponsor.
154. The applicant submitted some corroborating documentary evidence about the existence of the three joint bank accounts.
155. On 19 February 2012, the parties opened a '[Account 1]' account ending in the numbers [deleted]. When the Department was considering the matter, there was limited evidence of use of this account. For example, the Department's file for the consideration of the grant of the Subclass 820 visa contains a statement evidencing that, on 11 April 2012, the account had a balance of \$33.53. It was not until 26 April 2018 that the applicant submitted more detailed evidence of the use of this account. The applicant provided the Tribunal with copies of statements for this account for the period 19 February 2012 to 19 May 2013. The Tribunal notes that the account was used throughout this period and that the statement for 20 August 2012 to 19 November 2012 evidences a lot of transactions, which correlates with the applicant's move from [City 1] to [City 2]. The Tribunal notes that later statements evidence the deposit of salary as well expenditure. The Tribunal gives some weight to this evidence.

156. On 27 October 2013, the parties opened a '[Account 2]' account ending in the numbers [deleted]. The Tribunal notes that the applicant submitted statements for this joint bank account for various dates in 2013–2017. The Tribunal notes that the statements evidence use of the account throughout the period. The statements show the deposit of a salary as well as use for various expenditure, including at supermarkets and petrol stations and for the payment of bills such as to [a mobile phone company]. The Tribunal gives some weight to this evidence.
157. At the first hearing, the applicant also informed the Tribunal that they had substantial joint savings (\$21,000). The former Member did not ask where this money was banked. The applicant later provided the Tribunal with a copy of a statement for the parties' joint account ending in the numbers [deleted] for the period 17 December 2016 to 16 January 2017 which shows a closing balance of just over \$26,000.
158. The Tribunal also notes that the applicant later provided a copy of a statement for the parties' joint '[Account 3]' account for the period 16 March 2017 to 30 June 2017. The Tribunal notes that the closing balance as at that time was just under \$47,000.
159. The Tribunal gives some weight to the evidence that, prior to the cessation of the claimed relationship on 20 July 2017, the applicant and the sponsor had substantial joint savings.
160. The applicant's consistent oral evidence at both hearings was that he was the person who was primarily responsible for paying the day-to-day household expenses. The Tribunal notes the earlier mentioned utility bills which were addressed to the applicant at the [Address 1] property as well as spreadsheets in the applicant's name, each entitled 'Account Statement', which record payments for electricity and gas at the [Address 1] property for various dates in 2012 and 2013. These various statements corroborate the applicant's claim to be the person in the relationship who took responsibility for paying the bills.
161. The applicant told the Tribunal that he was the one who paid for the rent of the bungalow at the [Address 1] property when they had lived there. The Tribunal notes [Mr B]'s broadly consistent statement, outlined earlier, that the applicant and the sponsor rented the bungalow and paid \$1,000 per month inclusive of electricity.
162. The applicant also gave oral evidence that, at the time of the first hearing when they claimed to be living at the [Address 2] property, he was the one who paid \$500 per month to the sponsor's sister and her husband ([Mr A]) for board, bills and groceries. [Mr A] gave corroborating oral evidence at the first hearing.
163. With respect to whether one person in the relationship owed any legal obligation in respect of the other, the Tribunal notes that, at the second hearing, the applicant gave oral evidence that, prior to the cessation of the relationship, he had nominated the sponsor as the beneficiary of his superannuation fund. The Tribunal notes that there is corroborating documentary evidence, dated 21 March 2016, on the Tribunal's file. (The applicant said that the sponsor had no superannuation as she was paid in cash).
164. The Tribunal gives weight to the evidence of the financial aspects of the relationship.
165. *The nature of the household*
166. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.

167. There is no evidence before the Tribunal that, prior to the cessation of the claimed relationship, the applicant and the sponsor were jointly responsible for the care and support of children. The Tribunal notes that the applicant claims that he moved out of the [Address 2] property on 20 July 2017 which was about a week before the sponsor gave birth to her daughter. The sponsor has denied that the applicant is the biological father of that child and denied him access to the child. The Tribunal accepts the evidence that the applicant and the sponsor do not have any biological children together.
168. At the first hearing, the applicant and the sponsor gave consistent oral evidence about their living arrangements.
169. They claimed to have first established a household together at the [Address 1] property in July 2012. The sponsor told the Tribunal that the two of them had lived in the main house on the [Address 1] property for the first six months but, because they could not afford to pay the rent, they then moved to the two bedroom bungalow on the property and that they lived together there for three years or more. The applicant similarly told the Tribunal that he and the sponsor had lived together in the main house for a number of months before both moving to the bungalow.
170. The parties also told the Tribunal that, at the time of the first hearing on 12 September 2016, they were living together at the [Address 2] property with members of the sponsor's sister's family. The written submissions of 8 August 2016 stated that the parties had moved to this property on 22 May 2016. The sponsor said that she had been living at the property for about three months and that, before that time, she had been living at the [Address 1] property. [Mr A] gave corroborating oral evidence that the applicant and the sponsor were living with him and his family and that they had done so for three months.
171. With respect to any sharing of responsibility for housework, [Mr A] told the Tribunal that his wife (the sponsor's sister) is a housewife and the sponsor told the Tribunal that her sister did the cooking for the household. Otherwise, the arrangements for housework were not discussed at the first hearing. At the second hearing, the applicant told the Tribunal that, when he and the sponsor had lived together, they had shared domestic responsibilities. He said that the sponsor was the one who usually did the grocery shopping and cooking but that sometimes he would cook for her or buy something special for her. He said that the sponsor did the cleaning too. He said that he mainly did the heavy work. The Tribunal notes that this oral evidence as to the shared responsibility for housework was broadly consistent with the claims made in the written submissions of 8 August 2016.
172. The Tribunal notes that the applicant was critical of the delegate for not having given more weight to the parties' cohabitation documents (see submissions of 15 July 2015). The Tribunal acknowledges the many documents which corroborate the applicant's and the sponsor's claims that they lived together at both the [Address 1] property and at the [Address 2] property.
173. For example, the Departmental files contain correspondence from various organisations addressed to the applicant as well as PAYG group certificates in the applicant's name that were addressed to him at the [Address 1] property. The Tribunal notes that the documents which were addressed to the sponsor separately at the [Address 1] property were limited in number. (In this respect, the Tribunal notes that a number of the internet bills which are on the Department's file for the consideration of the grant of the Subclass 820 visa are addressed to [another person]—not the [sponsor]). The Tribunal notes that the applicant submitted many more documents to the Tribunal. For example, the applicant submitted personal, handwritten correspondence from Vietnam jointly addressed to the parties at the [Address 1] property as well as some correspondence addressed to them both separately at the [Address 1] property. The Tribunal notes that the applicant also submitted copies of

correspondence addressed to both him and the sponsor (both jointly and separately) at the [Address 2] property.

174. Notwithstanding the plethora of documentary evidence corroborating the parties' claims as to their living arrangements, the Tribunal has strong doubts that they lived together in a spousal relationship as claimed. This is for a couple of reasons.
175. First, the Tribunal has some concerns that some of the documents may have been generated to create a positive impression of the couple's claimed relationship rather than as a genuine reflection of the nature of the household.
176. For example, the Tribunal notes that the applicant submitted a copy of the residential tenancy agreement, dated 1 January 2012, to the Department at both the time the Department was considering the grant of the Subclass 820 visa (folios 158–159) and at the time it was considering the grant of the Subclass 801 visa (folios 52–53). While both signed agreements are for the rent of the [Address 1] property and record [Mr B] as the landlord, these are two different documents. While the one which is on the Department's file for the consideration of the Subclass 801 visa is marked 'Tenant's copy', this alone does not explain the discrepancies between the documents. The former (that is, at ff.158–159) lists only the applicant as the tenant and records his address as an address in [a certain state]. It states that the rent amount is \$1400 per month, with the first payment being due on 1 January 2012 and that rent is to be paid 'face to face'. By contrast, the agreement on the Department's file for the grant of the Subclass 801 visa (ff.52–53) lists both the applicant and the sponsor as tenants and records their address as the [Address 1] property. It states that the rent amount is \$1500 (cash) per month, with the first payment being due on 1 January 2012 and that the period of the agreement is 'long time contract'. The Tribunal suspects that both of these signed residential tenancy agreements may have been created to provide the applicant with evidence that he was residing with and committed to the sponsor rather than as a true reflection of the living arrangements.
177. Further, the Tribunal notes that much of the documentary evidence jointly addressed to the parties—for example bank statements—may be generated without actual proof that parties live together.
178. Secondly, as noted earlier, it was only after the applicant made his family violence claim that he volunteered information that he and the sponsor had lived separately when the sponsor was imprisoned for a few months in 2015.
179. In the applicant's statutory declaration of 12 September 2017, he claimed that on a day around the middle of March 2015, the sponsor was 'arrested and charged for [offences]'. He continued, stating, '[w]ith the help of her brother in law, my wife got bailed after spending four months in jail. She was out of prison in around July 2015'. At the second hearing, the applicant told the Tribunal that the sponsor had been in jail for 3–4 months in 2015. The Tribunal notes that [a doctor]'s letter of 11 September 2017; [a named person]'s letter of 27 November 2017; [a second named person]'s letter of 13 December 2017 and [a third named person]'s report of 30 December 2017 also state that the applicant had informed them that the sponsor was imprisoned in 2015.
180. The written submissions of 6 January 2018 gave the following details.
 181. Sometime in March 2015, the Police arrested the Applicant's spouse for [an offence]. She was found guilty and was sentenced on 6 December 2016 for a period of two years and was given a good behaviour understanding.

182. At the second hearing, the Tribunal asked the applicant if the sponsor's imprisonment had been before the first Tribunal hearing but the applicant denied this and said that it was after it. The first Tribunal hearing was held on 12 September 2016 so the applicant's oral evidence to the Tribunal in this respect was clearly incorrect. It is clear from having listened to the audio recording of the first hearing that the former presiding Member was at pains to try to understand the reasons why the relationship had not really developed—in terms of working towards plans—since the grant of the Subclass 820 visa. At that hearing, the applicant referred to the sponsor's claimed medical conditions and also said that, 'our lives are very difficult at the moment' but he did not mention the sponsor's legal issues. The Tribunal is concerned by the applicant's motives in not giving fulsome evidence to the Tribunal.
183. Further, the Tribunal notes that some of the documents submitted undermine the applicant's claim that he and the sponsor lived together at the [Address 1] property in 2015.
184. The Tribunal notes that the applicant's national police certificate letter—which is dated [January] 2015 and is on the Department's file for the consideration of the grant of the Subclass 801 visa—was addressed to the applicant at an address in [Town 1]. The Tribunal notes that the applicant's friend [Ms D] made a Form 888 statutory declaration on 28 January 2015 where she gives this address in [Town 1] as her residential address.
185. The statement for the '[Account 2]' joint bank account for the period 17 July 2015 to 16 August 2015 was also addressed to both the applicant and the sponsor at the [Town 1] address.
186. It is unclear to the Tribunal why the applicant had this mail sent to the [Town 1] address rather than the claimed marital home at these times. It may be that the applicant moved away from the [Address 1] property. In this respect, the Tribunal notes that in his statutory declaration of 12 September 2017, the applicant declared, '[m]y mental state got worse after my wife was arrested as I feared her associates might come to look for me for revenge'. However, the Tribunal has no clear evidence whether the applicant did move away and whether he moved into the property in [Town 1].
187. Thirdly, as noted earlier, the Tribunal gives some weight to some of the adverse information put to the applicant for comment or response pursuant to s.359AA and s.359A of the Act. Specifically, the applicant's oral evidence that he and the sponsor had lived together in the main house at the [Address 1] property for a number of months when the documentary evidence suggests that they lived there for closer to a year and a half and the allegation that the applicant and the sponsor were not living together but rather that the sponsor was living at the [Address 1] property with [Mr B] and that the applicant was living somewhere else.
188. Given the Tribunal's concerns, the Tribunal gives limited weight to the evidence of the nature of the household.

189. The social aspects of the relationship

190. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
191. There is evidence before the Tribunal that, prior to the cessation of the claimed relationship, the applicant and the sponsor had represented themselves to some other people as being married to each other. For example, the Tribunal notes that the parties' registered certificate of marriage states that [Mr B] was one of the two witnesses to the marriage.

192. The Tribunal also notes that in the sponsor's affidavit of 1 December 2017 she stated:

193. The Applicant and I executed a marriage certificate [in] March 2012, save for a few friends witnessing the execution of the marriage certificate, there was no wedding celebration, no family members and friends were invited to the wedding.

194. There was no wedding because of ... our financial circumstances and further ... we were rushing to have the marriage certificate being executed as the Applicant's [temporary] visa was about to expire.

195. At the first hearing, the former Member asked the applicant and the sponsor various questions about the recognition of the claimed relationship by their families in Vietnam. The former Member noted that engagements and weddings are significant events in the Vietnamese calendar yet none of these events had taken place in Vietnam with either of their families. The applicant said that he and the sponsor had fallen in love and married in Australia and that it would have cost them a lot of money to go to Vietnam to have a wedding there. The Tribunal accepts the parties' consistent evidence that they elected not to have a wedding celebration in Vietnam to save on financial costs.

196. The Tribunal notes that the applicant submitted a handwritten letter in the Vietnamese language, dated 19 March 2012, from the applicant's father to the parties. While a translation was not provided, the Tribunal notes that the date was two days after the parties married so the Tribunal assumes that the letter shows recognition of the marriage by the applicant's family.

197. The Tribunal also notes and gives weight to the various statutory declarations from the parties' friends that have been submitted. Various declarants claim to be aware that the applicant and the sponsor were married.

198. The Tribunal also notes and gives some weight to [Mr A]'s oral evidence at the first hearing. He gave oral evidence that he lived with the applicant and the sponsor and sometimes socialised with them. He said that he travelled to [a town] with the sponsor to their shared workplace and said that he saw the applicant on weekends. He told the Tribunal that he believed that the applicant and the sponsor were in a genuine and continuing relationship because they did things as a couple, although he said that he did not know where they went when they went out together. Having listened to the audio recording of the first hearing, the Tribunal does not find [Mr B]'s evidence to be particularly convincing but nevertheless gives some weight to it.

199. The Tribunal has also reviewed and considered the many Form 888 statutory declarations and other third party statements that have been made by the applicant's and the sponsor's friends or others known to them which are on the Department's files and on the Tribunal's file, including:

- [Mr B]'s Form 888 statutory declaration of 31 March 2012;
- [Ms C]'s Form 888 statutory declarations of 31 March 2012 and 30 January 2015;
- [Ms D]'s Form 888 statutory declaration of 28 January 2015;
- [Mr E]'s signed letter of support of 10 October 2017;
- [Mr F]'s statutory declaration of 18 November 2017;
- [A named person]'s statutory declaration of 26 November 2017;

- [Mr G]’s signed letter of 12 December 2017;
- [Mr H]’s statutory declaration of 12 April 2018;
- [Ms I]’s statutory declaration of 14 April 2018; and
- [Ms J]’s statutory declaration of 21 April 2018.

200. The primary decision implies that the delegate gave little to no weight to the Form 888 statutory declarations that were before it when it was considering the grant of the Subclass 801 visa—namely the declarations made by [Ms D] on 28 January 2015 and [Ms C] on 30 January 2015. The reasons given were because they were ‘generic in nature and provide no insight into the progression of your relationship since the grant of your UK 820 visa’. The Tribunal has reviewed these two statements and notes that, while both declarants claim that they socialised with the parties and believed the relationship to be a genuine and continuing one, they gave quite high level reasons in support of their opinions. Notwithstanding, the Tribunal gives some weight to these declarations.
201. The Tribunal does not give any weight to [Mr E]’s and [Mr G]’s support letters or [Mr F]’s statutory declaration because these documents do not contain any or sufficient information about the declarants’ knowledge or opinions of the claimed spousal relationship.
202. The Tribunal affords the other declarations some weight in respect of evidencing the social aspects of the relationship. The Tribunal notes that some of the declarants provided detailed reasons for considering the parties’ relationship to be genuine and continuing.
203. With respect to joint social activities, both the applicant and the sponsor gave broadly consistent oral evidence at the first hearing that they did not go out together frequently. The applicant explained that they were very busy working during the week and that they really only had Sundays to do things together. He told the Tribunal that he and the sponsor had attended [an event] in [Town 1] together on the day before the hearing. He also noted that they had travelled together in the past, naming [various places], but he said that they had not done that for a while because the sponsor’s health was not good.
204. By contrast, at the second hearing, the applicant recollected that he and the sponsor had engaged in quite a lot of joint social activities. He noted that he had some photographs of them socialising together with their friends. The Tribunal notes that it has reviewed a number of photographs of the parties socialising together, on a number of occasions and notes that some of the photographs contain descriptions and dates. The Tribunal gives some weight to this evidence.
205. The Tribunal gives weight to the evidence of the social aspects of the relationship.

206. *The nature of the person’s commitment to each other*

207. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons’ commitment to each other.
208. With respect to the duration of the claimed relationship prior to its cessation, the Tribunal has had regard to the applicant’s and the sponsor’s claims that they first met in Vietnam in 2003 when they were both students and that their relationship in Australia commenced in or around 2010 or early 2011. In his Form 47SP, the applicant nominated 11 February 2012 as the date that the parties both made the decision to commit to a long-term relationship. The

Tribunal gives some weight to the evidence that, prior to the cessation of the claimed relationship on 20 July 2017, the applicant and the sponsor had been married for over five years.

209. The Tribunal has also had regard to the applicant and the sponsor's oral evidence about how they spent their time together (that is, the degree of their companionship) and their claims that, at the time of the first hearing, they each saw their relationship as being for the long term. (The Tribunal has also had regard to the applicant's claims at the second hearing that, during the course of the relationship, he and the sponsor had two pregnancies that did not reach full term. However, the Tribunal has no corroborating medical evidence in this respect and accordingly gives this claim no weight).
210. However, the Tribunal has some concerns about the nature of each person's commitment to the other prior to the cessation of the claimed relationship. The Tribunal is concerned by a number of matters in the evidence.
211. First, as noted earlier, while there is much documentary evidence in support of the applicant's claim that they lived together since the applicant's arrival in [City 2] in July 2012, the Tribunal has concerns that the applicant and the sponsor may not have lived together in a partner relationship as claimed. (See the earlier section of these reasons entitled 'the nature of the household').
212. Secondly, as noted earlier, the Tribunal gives some weight to some of the adverse information put to the applicant for comment or response pursuant to s.359A of the Act. Specifically:
- The Tribunal's finding that the applicant's actions on Facebook in 2012 point away from his claim that, prior to the cessation of the claimed relationship, he and the sponsor had a mutual commitment to a shared life together as husband and wife to the exclusion of all others.
 - The sponsor's listing of '[Mr B]' rather than the applicant as her emergency contact person in her incoming passenger card of 8 February 2014 causes the Tribunal to question the sponsor's commitment to the relationship.
 - The sponsor's joint overseas travel with [Mr B] from 23 September 2013 to 8 October 2013 also causes the Tribunal to question the parties' claimed commitment to the relationship. The written submissions of 19 March 2018 state that the sponsor and [Mr B] travelled together at this time to visit the sponsor's father who was very ill and subsequently passed away in 2014 and that the applicant did not travel with the sponsor because he had started a new job, was under probation and did not want to jeopardise his job. While this may be a plausible explanation, in the context of all the circumstances of this case, the Tribunal has some doubts.
213. Thirdly, the Tribunal notes that at the second hearing, the applicant gave oral evidence that he had visited the sponsor in jail on only one occasion. After ascertaining that the jail was in [location], the Tribunal asked the applicant if there was a reason that he had visited the sponsor only once in a period of 3–4 months. He said that something had happened in the relationship and he was worried that the marriage would break down. Again, while this may be a plausible explanation, in the context of all the circumstances of this case, the Tribunal is concerned that the applicant's act of visiting the sponsor only once during a period of 3–4 months that she was allegedly in jail suggests a lack of commitment on his part to the claimed relationship.

214. Given the Tribunal's concerns outlined in this section of the decision, the Tribunal gives little weight to the evidence of the nature of each person's commitment to the other.

215. **CONCLUSION**

216. As stated above, the Tribunal is satisfied that the parties were validly married, as required by s.5F(2)(a) of the Act. There is no evidence before the Tribunal that the parties have divorced.

217. While it may be possible to attack one or more of the matters that the Tribunal has highlighted above, it is the force of the combination of those aspects that leads the Tribunal to make the following conclusions.

218. On the basis of the evidence considered as a whole, and for the reasons given with respect to the r.1.15A(3) matters, the Tribunal is not satisfied that, prior to the cessation of the claimed relationship, the applicant and the sponsor:

- had a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
- had a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
- were living together, or were not living separately and apart on a permanent basis, as required by s.5F(2)(d) of the Act.

219. On the basis of the evidence, the Tribunal is not satisfied that, prior to the end of the claimed relationship, that the applicant and the sponsor were spouses, as defined in s.5F of the Act. The Tribunal finds that cl.801.221(6)(b) is not established.

220. As the Tribunal finds that the parties were not in a genuine spousal relationship, the Tribunal considers that it is unnecessary for the Tribunal to consider the applicant's claim that, pursuant to cl.801.221(6)(c)(i), he suffered family violence committed by the sponsoring partner. The Tribunal understands that the applicant is no longer making a claim under cl.801.221(6)(c)(ii). Even if the Tribunal is mistaken in this regard, the Tribunal considers that it is unnecessary for the Tribunal to consider the applicant's claim because cl.801.221(6)(b) is not established.

221. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

222. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).